United Nations A/68/261

General Assembly

Distr.: General
5 August 2013

Original: English

Sixty-eighth session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Human rights in the administration of justice: analysis of the international legal and institutional framework for the protection of all persons deprived of their liberty

Report of the Secretary-General

Summary

The present report, submitted pursuant to General Assembly resolution 67/166, provides an analysis of the applicable international legal and institutional framework for the protection of all persons deprived of their liberty and identifies major challenges in this regard. It concludes that, while a comprehensive framework for the protection of all persons deprived of their liberty exists, the main challenges lie in the implementation of relevant norms and standards at the domestic level.

* A/68/150.

13-41798 (E) 300813

Please recycle

I. Introduction

1. The General Assembly, in its resolution 67/166 on human rights in the administration of justice, requested the Secretary-General to submit to the Assembly at its sixty-eighth session and to the Human Rights Council at its twenty-fourth session a report on the latest developments, challenges and good practices in human rights in the administration of justice, analysing the international legal and institutional framework for the protection of all persons deprived of their liberty, and on the activities undertaken by the United Nations system as a whole.

2. While international law provides a comprehensive framework for the protection of all persons deprived of their liberty, the reality for many of them in all regions of the world remains alarming. According to recent statistics, more than 10 million people around the world are deprived of their liberty, 3.2 million of them awaiting trial.[1] Deprivation of liberty places individuals in a vulnerable situation and has always been and remains a principal means by which human rights are suppressed and violated.

3. The present report provides an analysis of the applicable legal and institutional framework for the protection of all persons deprived of their liberty and identifies and analyses major challenges in this regard. The report also presents conclusions and recommendations.

II. Framework for the protection of all persons deprived of their liberty

A. Legal framework

1. Relevant treaties

4. The human rights of persons deprived of their liberty are set out in all core international human rights instruments. The International Covenant on Civil and Political Rights provides important protection to persons deprived of their liberty. In particular, its article 9 guarantees the right to security and liberty. Article 7 prohibits the use of torture and other forms of ill-treatment, and article 10 provides that persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. Furthermore, article 14 ensures the right to a fair trial and other procedural guarantees, particularly for persons deprived of their liberty.

5. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the use of torture and other forms of ill-treatment. The Optional Protocol thereto, aimed at the prevention of torture and other forms of ill-treatment, establishes a system of visits by international and national bodies (the Subcommittee on Prevention of Torture and national preventive mechanisms, respectively) to places of detention. The International Convention for the Protection of All Persons from Enforced Disappearance refers to cases of unacknowledged or concealed deprivation of liberty.

[1] Roy Walmsley, World Prison Population List, 9th ed. (London, International Centre for Prison Studies, 2011); Open Society Justice Initiative Global Campaign for Pretrial Justice, www.pretrialjustice.org.

6. The International Covenant on Economic, Social and Cultural Rights guarantees the enjoyment of economic, social and cultural rights for all, including persons deprived of their liberty. The International Convention on the Elimination of All Forms of Racial Discrimination seeks to eliminate any form of racial discrimination, including in places of detention. The other core international human rights treaties establish and protect the rights of specific groups of persons, including women, children, migrants and persons with disabilities, particularly when those persons are deprived of their liberty.[2]

7. International humanitarian law provides an important framework for the protection of persons deprived of their liberty during armed conflict. In international armed conflicts, the Geneva Convention relative to the Treatment of Prisoners of War sets out in great detail the detention regime and conditions of detention for prisoners of war. The Geneva Convention relative to the Protection of Civilian Persons in Time of War includes rules regarding internment. The Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, also provides for the protection of prisoners of war and civilians detained or interned in relation to armed conflict. The protection of persons deprived of their liberty in non-international armed conflicts is provided for in common article 3 to the Geneva Conventions of 1949 and by provisions of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts.

8. International labour norms and standards may be relevant for persons deprived of their liberty. For instance, certain types of labour during imprisonment are covered by the International Labour Organization (ILO) Convention concerning Forced or Compulsory Labour (Convention No. 29) of 1930. Deprivation of liberty of trade unionists is dealt with by ILO mechanisms under the Convention concerning Freedom of Association and Protection of the Right to Organise (Convention No. 87) of 1948.

2. Other relevant standards

9. Specific issues affecting the rights of persons deprived of their liberty are dealt with in various non-binding instruments, including the treatment of prisoners,[3] investigation of torture,[4] non-custodial measures,[5] restorative justice[6] and the protection of women,[7] children[8] and asylum seekers.[9] These instruments represent

[2] Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child; Second Optional Protocol to the International Covenant on Civil and Political Rights; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and Convention on the Rights of Persons with Disabilities.

[3] Standard Minimum Rules for the Treatment of Prisoners; Basic Principles for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; safeguards guaranteeing protection of the rights of those facing the death penalty.

[4] Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[5] United Nations Standard Minimum Rules for Non-custodial Measures.

[6] Basic principles on the use of restorative justice programmes in criminal matters.

[7] United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).

[8] United Nations Standard Minimum Rules for the Administration of Juvenile Justice; United Nations Rules for the Protection of Juveniles Deprived of their Liberty; Guidelines for Action on Children in the Criminal Justice System; United Nations Guidelines for the Prevention of Juvenile Delinquency.

[9] Office of the United Nations High Commissioner for Refugees, Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers.

invaluable guidance for all stakeholders as they assist in shaping the precise content of provisions enshrined in human rights treaties. Human rights mechanisms frequently refer to these instruments in their work. Treaty bodies request States to indicate, in initial and periodic reports, the extent to which they are applying standards included in non-binding instruments, such as the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and regularly refer to them in their concluding observations and individual communications (see for instance CCPR/C/2009/1, paras. 64-69; CCPR/C/ARG/CO/4, para. 17; CAT/C/4/Rev.3; CCPR/C/51/D/458/1991, para. 9.3; and CEDAW/C/GRC/CO/7, paras. 34-35; see also A/61/311 and A/HRC/8/3).

3. Recent developments

10. In 2010, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) were adopted, and, in December 2012, the General Assembly adopted the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which provide that States should ensure that anyone detained is entitled to legal aid (Assembly resolution 67/187, annex, sect. B, principle 3). In 2012, the Human Rights Council requested the Working Group on Arbitrary Detention to prepare draft basic principles and guidelines, for presentation to the Council in 2015, on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, with the aim of assisting Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty in compliance with international human rights law (Council resolution 20/16, para. 10). The Standard Minimum Rules for the Treatment of Prisoners are currently under review, with a view to ensuring that the Rules reflect recent advances in correctional sciences and best practices (Assembly resolution 65/230).

B. International human rights mechanisms

1. Treaty bodies

11. Treaty bodies are at the core of the international human rights protection system, including for the rights of persons deprived of their liberty. The Human Rights Committee regularly addresses a wide range of issues related to the protection of persons deprived of their liberty in concluding observations and through the consideration of individual communications. It has also adopted a number of general comments that elaborate on issues relating to deprivation of liberty.[10] In paragraph 2 of its General Comment No. 21, on the humane treatment of persons deprived of liberty, the Committee states that the protection provided by article 10, paragraph 1, of the International Covenant on Civil and Political Rights applies to anyone deprived of liberty under the laws and authority of the State, including persons held in prisons, hospitals, particularly psychiatric hospitals, detention camps, correctional institutions or elsewhere.

12. The Committee against Torture is specifically mandated to examine issues related to the treatment of persons deprived of their liberty and the conditions of their detention. In its general comments, it has elaborated on the issues of

[10] See for example General Comments Nos. 8 (1982), 20 (1992), 21 (1992) and 32 (2007).

non-refoulement (No. 1), the prevention of acts of torture (No. 2) and redress for victims of torture (No. 3). In its reporting guidelines, the Committee requests States to provide information on laws, regulations and instructions concerning the treatment of persons deprived of their liberty (CAT/C/4/Rev.3). The Committee also addresses a number of key issues relating to persons deprived of their liberty in its concluding observations and through its consideration of individual communications. It regularly expresses its concern about treatment and conditions of detention, such as overcrowding, insufficient ventilation and lighting, poor sanitation and hygiene facilities and inadequate access to health care (CAT/C/MDA/CO/2, para. 18; CAT/C/41/D/291/2006, para. 15.4).

13. The Committee on Economic, Social and Cultural Rights has specifically highlighted the importance of guaranteeing the enjoyment of economic, social and cultural rights for persons deprived of their liberty. In various general comments and concluding observations, it has, for instance, addressed the rights of persons deprived of their liberty to the highest attainable standard of health; water; work; social security; and non-discrimination in economic, social and cultural rights.[11]

14. The Committee on the Elimination of Racial Discrimination devoted its General Recommendation No. 31 to the issue of prevention of racial discrimination in the administration and functioning of the criminal justice system. In various general recommendations, it touched upon the issue of racial discrimination against people of African descent (No. 34 (2011), paras. 6 and 39), non-citizens (No. 30 (2004), paras. 20-21) and Roma (No. 27 (2000), para. 13), including when deprived of their liberty. In its reporting guidelines, it requires States to report on measures taken to ensure the right to equal treatment before tribunals and other organs administering justice and the right to security of person, in particular in connection with arrest and detention (CERD/C/2007/1).

15. Treaty bodies monitoring the implementation of treaties dealing with specific groups of persons also refer to the rights of persons deprived of their liberty through general comments, consideration of individual communications, and concluding observations, including by requiring that States report on issues related to detention. For instance, the Committee on the Rights of Persons with Disabilities requires States parties to report on the right to liberty and security of persons with disabilities, as well as their freedom from torture and other ill-treatment (CRPD/C/2/3). The Committee on the Rights of the Child has addressed children's rights in juvenile justice in its General Comment No. 10 (2007). The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, in its concluding observations, expressed concern as to the conditions and length of detention of migrants (CMW/C/CHL/CO/1, para. 26) and at the lack of procedural safeguards concerning decisions on detention (CMW/C/BIH/CO/2, paras. 25 and 27). In its views on an individual communication, the Committee on the Elimination of Discrimination against Women recalled that detention facilities not addressing the specific needs of women constituted discrimination (CEDAW/C/49/D/23/2009, para. 7.5).

16. In addition to the consideration of State party reports and individual communications, the Committee on Enforced Disappearances can also consider

[11] See General Comments Nos. 14, 15 and 18 to 20; and E/C.12/BEN/CO/2, para. 23, E/C.12/POL/CO/5, para. 26, and E/C.12/UKR/CO/5, paras. 26, 28, 29, 49 and 51.

requests submitted by relatives of disappeared persons, their legal representatives and others having a legitimate interest that a disappeared person be sought and found.

17. The Subcommittee on Prevention of Torture was established with a view to strengthening the protection of persons deprived of their liberty against torture and other forms of ill-treatment through a preventive system of regular visits to places of detention. It visits locations under the jurisdiction and control of a State party to the Optional Protocol to the Convention against Torture where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority, at the authority's instigation or with its consent or acquiescence.[12] States parties should provide the Subcommittee with unrestricted access to all places of detention, the opportunity to have private interviews with persons deprived of their liberty and information referring to the treatment of those persons and their conditions of detention.[13] Since its establishment in 2006, the Subcommittee has carried out such visits in 17 countries. On the basis of its findings in each State party, the Subcommittee produces a confidential report and makes recommendations to States parties.[14] States may authorize the publication of the report.[15]

18. The advisory function of the Subcommittee on Prevention of Torture, which consists of providing assistance and advice to both States parties and national preventive mechanisms,[16] including through advisory visits, is another important aspect of its work. At the time of writing, the Subcommittee had carried out this function in four countries. Furthermore, the Subcommittee carries out follow-up visits.

19. The Subcommittee on Prevention of Torture faces some specific challenges, in particular the increased workload due to the rapid increase in the number of ratifications and accessions to the Optional Protocol. Although its membership expanded to 25 in January 2011, the Subcommittee has been able to undertake only three regular field visits each year, meaning that each State party can be regularly visited only once in 22 years. It is therefore imperative that priority be given to increasing the resources of the Subcommittee to enable it to adequately fulfil its important mandate to visit places of detention in all States parties, thus giving full effect to the obligations contained in the Optional Protocol to the Convention against Torture.

2. Special procedures

20. A significant number of thematic mandates have addressed issues relating to persons deprived of their liberty in their thematic and mission reports. The majority of country mandates have also covered detention-related issues in their reports (see for example A/HRC/4/36, A/HRC/7/25, A/HRC/10/19, A/HRC/11/5, A/HRC/17/42 and A/HRC/18/40).

[12] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, para. 1.

[13] Ibid., art. 14, para. 1, subparas. (a) to (d).

[14] Ibid., art. 11, para. 1 (a).

[15] Ibid., art. 16, para. 2.

[16] Ibid., art. 11, para. 1 (b).

21. The Working Group on Arbitrary Detention is mandated to investigate cases of deprivation of liberty imposed arbitrarily but also deals with a number of thematic issues relevant to the protection of persons deprived of liberty. It has concluded that many persons deprived of their liberty do not have access to substantive, procedural and institutional guarantees to secure all their rights (A/HRC/10/21, para. 46). The Working Group also formulates deliberations aimed at assisting States in guarding against the practice of arbitrary deprivation of liberty.

22. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment regularly examines issues relating to the treatment of persons deprived of their liberty, including incommunicado detention (A/54/426), gender-specific forms of torture (A/HRC/7/3), minimum sanitary and hygienic conditions (A/HRC/16/52/Add.3) and understaffing of prisons (A/HRC/7/3/Add.3). The Special Rapporteur on the independence of judges and lawyers addresses procedural rights, such as the right to challenge the legality of detention (E/CN.4/2006/120) and to be assisted by a lawyer (A/HRC/4/25/Add.2). The Special Rapporteur on extrajudicial, summary or arbitrary executions regularly addresses the issue of death in custody (A/HRC/14/24, A/61/311), the control of prisons by prisoners (A/HRC/8/3, A/HRC/11/2/Add.2) and physical abuse by guards and inmates (A/HRC/11/2/Add.2).

23. Other special procedures have addressed the protection of persons deprived of their liberty from the perspective of their mandates. For instance, the Special Rapporteur on the right to education addresses the right to education of persons deprived of their liberty (A/HRC/11/8). The Special Rapporteur on violence against women, its causes and consequences addresses issues relating to the protection of women from violence while deprived of their liberty. The Special Rapporteur on the human rights of migrants regularly focuses on the rights of migrants in detention, including legality of detention of migrants, procedural safeguards, conditions of detention, duration of detention, places of detention, groups of migrants requiring special attention while in detention and alternatives to detention (A/HRC/20/24). The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also dealt with issues relating to the protection of persons deprived of their liberty, in particular access to courts by persons in detention, review of continued preventive or investigative detention, fair trial guarantees of persons being detained (A/63/223) and rendition to places of secret detention (A/HRC/6/17/Add.3).[17]

24. The geographic scope of the work of thematic mandates is not restricted by the need for ratification of human rights treaties. In addition, special procedures mechanisms can act on an individual communication even without prior exhaustion of domestic remedies. However, while thematic mandates have a global reach and may raise issues of concern through correspondence with any Government, country visits are subject to an invitation by the concerned State. Another challenge raised

[17] Other mandates that have addressed the rights of persons deprived of their liberty include the Working Group on the Use of Mercenaries, the Special Rapporteur on trafficking in persons, especially women and children, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the rights of indigenous peoples, the Special Rapporteur on the sale of children, child prostitution and child pornography and the Independent Expert on minority issues.

by some mandate holders is the lack of sufficient resources available to support the conduct of more than a few country visits during a given year (A/HRC/14/24).

25. Special procedures have worked together on numerous occasions on issues of common interest, including detention-related matters. Some 75 per cent of allegation letters and urgent appeals are jointly sent by two or more mandates.[18] Mandate holders have also addressed cross-cutting issues through joint reports. In 2010, four of them issued a joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42), and, in 2006, five thematic mandates drafted a joint report on the situation of detainees at Guantanamo Bay (E/CN.4/2006/120). The annual meetings of treaty body chairpersons and special procedures mandate holders are also aimed at improving cooperation and the effectiveness of the two sets of human rights mechanisms. These forums could provide an opportunity to explore further joint initiatives in relation to the protection of persons deprived of their liberty.

3. Universal periodic review

26. In the course of the first cycle of the universal periodic review completed in 2011, numerous recommendations were addressed to States regarding the protection of persons deprived of their liberty. It was recommended that States: improve overall conditions of detention (A/HRC/17/17, para. 77.54); protect women (A/HRC/17/11, para. 106.35) and children (A/HRC/8/34, para. 64) in places of deprivation of liberty; eliminate the excessive use of force in holding areas for migrants (A/HRC/8/47, para. 60); and review legislation and policies to reduce the widespread use and excessive length of pretrial detention (A/HRC/16/6, paras. 69.22 and 70.14). Other recommendations concerned the extension of invitations for country visits to relevant special procedures mandate holders (A/HRC/12/11, para. 100; A/HRC/16/15, para. 95.10); unrestricted access to all detention facilities for independent human rights monitors (A/HRC/17/9, para. 107.32); and the review of conditions of places of deprivation of liberty as to whether they comply with international norms and standards, such as the Standard Minimum Rules for the Treatment of Prisoners (A/HRC/12/5, para. 82, recommendation 24; A/HRC/8/30, para. 54, recommendation 9). During the second cycle of the universal periodic review, States are expected to provide information on the implementation of the recommendations made during the first cycle, including all recommendations relating to the protection of persons deprived of their liberty.

4. Recent developments

27. With the recent entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights now has the possibility to receive and consider individual communications, including from persons deprived of their liberty.

28. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted General Comment No. 2, on the rights of migrant workers in an irregular situation and members of their families, in 2013, addressing, inter alia, administrative detention, non-discrimination, protection

[18] Office of the United Nations High Commissioner for Human Rights, "United Nations special procedures: facts and figures 2012". Available from www.ohchr.org/Documents/HRBodies/SP/Facts_Figures2012.pdf.

against violence, arbitrary arrest and detention, inhumane conditions of detention, and arbitrary expulsions. In 2012, the Working Group on Arbitrary Detention adopted Deliberation No. 9, which focuses on the definition and scope of arbitrary deprivation of liberty under customary international law (A/HRC/22/44). The Human Rights Committee is currently in the process of elaborating a new general comment on article 9 of the International Covenant on Civil and Political Rights, on the right to liberty and security of person.

29. In 2012, the Committee on the Elimination of Discrimination against Women held a day of general discussion on access to justice for women,[19] and in 2011 the Committee on the Rights of the Child held a day of general discussion on the issue of children of incarcerated parents.[20]

30. The Office of the United Nations High Commissioner for Human Rights (OHCHR) is active in promoting the protection of all rights of persons deprived of their liberty. OHCHR, in particular through its field presence, conducts visits to places of deprivation of liberty to monitor conditions of and the legal basis for detention. It provides advice on legal and policy reforms needed to ensure compliance with international norms and standards relating to deprivation of liberty. OHCHR also advocates for the protection of the rights of persons deprived of their liberty, including their right to judicial review, and provides training to judges, prosecutors, lawyers and corrections officers on relevant international norms and standards.

C. Other entities dealing with the protection of persons deprived of their liberty

31. Other United Nations entities also work towards the protection of persons deprived of their liberty. The United Nations Office for Project Services provides assistance to States in the design and construction of detention facilities that meet international standards.[21] The United Nations Office on Drugs and Crime provides assistance to States in the area of prison reform and alternatives to imprisonment.[22] The United Nations Children's Fund is active in working on issues linked to the protection of children in conflict with the law, for instance by promoting non-custodial measures and conducting training courses for officials from the justice system.[23] The Department of Peacekeeping Operations of the Secretariat contributes to the protection of the rights of prisoners by providing assistance to national prison systems in post-conflict States.[24] The Office of the United Nations High Commissioner for Refugees works to protect refugees, asylum seekers, stateless persons and other migrants deprived of their liberty, for instance through the development of guidelines directed at Governments on the detention of asylum seekers and alternatives to detention.[9]

[19] www.ohchr.org/EN/HRBodies/CEDAW/Pages/Accesstojustice.aspx.

[20] See the report on and recommendations from the day of general discussion on children of incarcerated parents, available from www2.ohchr.org/english/bodies/crc/docs/discussion/2011CRCDGDReport.pdf.

[21] www.unops.org/english/whatwedo/services/physical-infrastructure/experience-capacity/Pages/Prisons.aspx.

[22] www.unodc.org/unodc/en/justice-and-prison-reform/criminaljusticereform.html.

[23] www.unicef.org/protection/57929_57999.html.

[24] www.un.org/en/peacekeeping/issues/ruleoflaw/corrections.shtml.

32. The International Committee of the Red Cross (ICRC) plays an important role in the protection of persons deprived of their liberty in the context of international and non-international armed conflict. The Third Geneva Convention of 1949, in its articles 125 and 126, provides that the special position of ICRC will be recognized in relation to visits and the provision of relief to prisoners of war and that its delegates shall have permission to go to all places where prisoners of war may be. The Fourth Geneva Convention of 1949 contains the same provision in its articles 142 and 143 with regard to civilian internees. The thirty-first International Conference of the Red Cross and Red Crescent, in paragraph 6 of its resolution 1, invited ICRC to pursue further research, consultation and discussion to ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict.

33. The supervisory mechanisms of ILO have addressed issues relevant to persons deprived of their liberty. Its Committee on Freedom of Association has dealt with issues in relation to trade unionists, such as arrest, detention, bringing of charges and sentencing to imprisonment, preventive detention, detention during a state of emergency, internment in psychiatric hospitals and their physical and moral integrity.[25]

III. Challenges

34. On the basis of a survey of the work and findings of human rights treaty bodies and special procedures, a number of important challenges relating to the protection of persons deprived of their liberty were identified, in particular judicial oversight, overuse of detention (in particular concerning pretrial detention and detention of migrants), overcrowding in detention facilities, death and cases of serious injury in detention, and the protection of groups with distinct needs, including women, children and persons with disabilities.

A. Judicial oversight

35. A key element in the protection of the rights of persons deprived of their liberty is the judicial oversight of both the legality and conditions of their detention. While article 9, paragraph 4, of the International Covenant on Civil and Political Rights provides the right for anyone deprived of his or her liberty to take proceedings before a court in order for it to decide on the lawfulness of his or her detention, the lack of adequate judicial oversight is frequently raised as a concern by human rights mechanisms. It is important to note that judicial oversight of legality of detention not only is essential for assessing whether a person is deprived of his or her liberty arbitrarily but also serves to ensure the protection of his or her other rights. The lack of such judicial oversight can facilitate torture and ill-treatment (CAT/C/PHL/CO/2, CAT/C/YEM/CO/2/Rev.1, CAT/C/ETH/CO/1).

36. The mere absence of a remedy of habeas corpus has been considered as a human rights violation, as it deprives the individual of the right to protection from arbitrary detention (A/HRC/19/57, para. 61). However, the existence of a

[25] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of ILO*, 5th (revised) ed. (Geneva, 2006).

mechanism ensuring judicial oversight of the legality of detention is not sufficient; it must also be effective. The body conducting the judicial review must not only be able to determine the legality of detention but also have the power to order release if it is determined that the detention is not lawful.[26] The review must take place promptly (A/HRC/6/17/Add.2, para. 77) and must be conducted by an independent body (E/CN.4/2006/120, para. 30). Moreover, effective access to judicial review of detention must be ensured, including through legal aid (A/HRC/10/21, para. 46).

37. Judicial oversight of the legality of detention is not limited to criminal procedure but extends to all forms of deprivation of liberty. For instance, human rights mechanisms have expressed concern regarding detention justified by medical or public health grounds, which is often not subject to judicial supervision (E/CN.4/2004/3, paras. 74 and 87). The inability of migrants deprived of their liberty to effectively exercise their right to challenge their detention based on immigration laws, and limited access to procedural safeguards, such as legal aid and adequate interpretation services (A/HRC/17/33/Add.4, para. 59; A/HRC/20/24, para. 15; CMW/C/BIH/CO/2, para. 25), have also been identified as a cause for concern.

38. In addition to difficulties regarding the legality of detention, human rights mechanisms have highlighted the importance of judicial oversight of conditions of detention and recommended that States provide for such oversight (CAT/C/CR/28/7, para. 6; CAT/C/TJK/CO/1, para. 7). Without access to judicial remedies, persons deprived of their liberty are at heightened risk of suffering abuse of authority, humiliation, ill-treatment and other unacceptable deprivations of rights (A/HRC/10/21, para. 47). It has also been noted that custodial deaths occur in the context of extremely poor prison conditions and nearly non-existent prison oversight (A/HRC/11/2/Add.3, para. 47). Finally, the right of detainees to lodge complaints and appeal to an independent, readily accessible body against disciplinary punishment has also been highlighted (CCPR/CO/81/BEL, paras. 20 and 22).

B. Overuse of detention

39. As the Working Group on Arbitrary Detention has pointed out, while States enjoy a wide margin of discretion in their choice of penal policy, the right to liberty of persons laid down in article 9 of the International Covenant on Civil and Political Rights requires that, as a basic principle, States have recourse to deprivation of liberty only insofar as it is necessary to meet a pressing societal need, and in a manner proportionate to that need (E/CN.4/2006/7, para. 63).

1. Pretrial detention

40. In some countries, pretrial detainees make up the majority of detainees.[27] For the purpose of the present report, pretrial detention covers any form of custody or confinement by law enforcement officials from the time of arrest until a person has been formally tried by a court. While international standards permit detention before

[26] International Covenant on Civil and Political Rights, art. 9, para. 4.

[27] International Centre for Prison Studies, "Entire world — pretrial detainees/remand prisoners (percentage of the prison population)", World Prison Brief database. Available from www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_pretrial.

trial under certain limited circumstances, pretrial detention must be exceptional and as short as possible.[28]

41. Human rights mechanisms have identified a number of problems in practice relating to pretrial detention, particularly that it is used not only in exceptional circumstances (A/HRC/19/57, para. 48; CAT/OP/MEX/1, paras. 212 ff.; CRC/C/15/Add.237, para. 76; A/HRC/13/39/Add.5, para. 235). In a number of countries, pretrial detention is used for minor offences. Furthermore, decisions on pretrial detention are often taken without considering the personal circumstances of defendants (A/HRC/11/41/Add.2, para. 35). Moreover, alternatives to detention, such as bail or recognizance, are often not sufficiently considered (A/HRC/4/33/Add.3, paras. 30 and 72 (s); A/HRC/7/3/Add.3, para. 65; A/HRC/16/47/Add.3, para. 73), and proceedings last far too long in many countries (A/HRC/10/11/Add.2, para. 53). These factors also frequently lead to an excessive length of pretrial detention (A/HRC/16/52/Add.3, para. 70; A/HRC/19/57, para. 48; CAT/C/CRI/CO/2, para. 5; CAT/OP/BEN/1, para. 156).[29] Some pretrial detainees spend years in prison without trial (E/CN.4/2006/53/Add.4, para. 93), sometimes even exceeding the maximum penalty possible in relation to the crime of which they are suspected (A/HRC/13/39/Add.5, para. 235). Policies and practices resulting in the widespread use and excessive length of pretrial detention are also among the main reasons for the overcrowding of prisons (CCPR/C/TUR/CO/1, para. 17; CCPR/C/CPV/CO/1, para. 14).

42. Pretrial detainees face a heightened risk of being tortured or ill-treated (CAT/C/LVA/CO/2, para. 10; CAT/C/BLR/CO/4, para. 10) for the purpose of gaining information or a confession (A/HRC/4/33/Add.3, paras. 29-30 and 57; CAT/C/TJK/CO/2, para. 9) or to coerce detainees into cooperating in an investigation (A/HRC/10/44/Add.2, para. 41). Concerns have been raised that pretrial detainees are held with sentenced prisoners (CAT/OP/BEN/1, para. 154). Human rights mechanisms have also found that due process guarantees are often violated: pretrial detainees are left in detention without access to a lawyer or legal aid and without being brought before a judge (CAT/C/RWA/CO/1, para. 12). They are also left without access to independent medical examination or to their family (CAT/C/NPL/CO/2, para. 21; CAT/C/BLR/CO/4, para. 6; CAT/C/ALB/CO/2, para. 13). The lack of registration systems in some countries is also problematic (CAT/C/RWA/CO/1, para. 12). Finally, it has also been highlighted that pretrial detention disproportionately affects groups that have difficulty meeting the criteria for parole, in particular the poor, the homeless, drug users, substances abusers, alcoholics, the chronically unemployed, persons suffering from mental disability and non-citizens (CERD/C/AUT/CO/18-20, para. 13; E/CN.4/2006/7, para. 66).[30]

[28] International Covenant of Civil and Political Rights, art. 9, para. 3. Pretrial detention must be based on an individualized determination that it is reasonable and necessary in all circumstances for the purpose of preventing flight, interference with the lawful collection of (incriminating) evidence or intimidation of witnesses and the recurrence of crime; see CCPR/C/39/D/305/1988, para. 5.8; CCPR/C/99/D/1369/2005, para. 8.3.

[29] On the average length of pretrial detention in member States of the European Union, see European Commission, "Accompanying document to the proposal for a Council framework decision on the European supervision order in pretrial procedures between member States of the European Union: impact assessment", 29 August 2006.

[30] See also European Commission, "Accompanying document to the proposal for a Council framework decision on the European supervision order in pretrial procedures between member States of the European Union: impact assessment".

2. Detention of migrants

43. Migrants face a particular risk of systematic and extensive detention. Different categories of migrants may be subjected to detention, including migrants who are undocumented or in an irregular situation, asylum seekers awaiting the outcome of their asylum application, failed asylum seekers awaiting removal and refugees (A/HRC/20/24, para. 8).

44. All persons, regardless of their status, have the right not to be subjected, individually or collectively, to arbitrary arrest or detention and the right not to be deprived of liberty except on such grounds and in accordance with such procedures as established by law.[31] They also have the right to be treated humanely when deprived of their liberty.[32]

45. As noted by the Special Rapporteur on the human rights of migrants, increasingly tough detention policies have been introduced over the past 20 years in countries around the world. States use a wide range of reasons to justify the detention of irregular migrants, including portraying them as a national security threat or as criminals. However, empirical evidence does not show that detention deters irregular migration or discourages persons from seeking asylum. In addition, detention of migrants remains far less regulated and monitored than criminal detention. In that context, human rights are often neglected (A/HRC/20/24, para. 8; see also A/HRC/13/30, para. 55).

46. Human rights mechanisms have emphasized the mandatory or systematic detention of migrants, including families and children, as a major issue of concern (A/HRC/7/12/Add.2, paras. 68 ff.; A/HRC/23/46/Add.4, paras. 51 and 62; A/HRC/17/33/Add.3, para. 49; CRC/C/GBR/CO/4, para. 70). Moreover, the grounds for their detention, its duration, detention conditions and access to safeguards are not always sufficiently established in law (A/HRC/23/46/Add.2, para. 42). The excessive length of detention of migrants has also been highlighted as problematic (CMW/C/CHL/CO/1, para. 26; A/HRC/20/24, para. 21; CEDAW/C/MYS/CO/2, para. 27; A/HRC/7/4, para. 46). Concerns have been raised about the harsh conditions and treatment of migrants while in detention (A/HRC/20/24/Add.1, para. 60; CMW/C/CHL/CO/1, para. 27; A/HRC/23/46/Add.3, paras. 63 ff.; A/HRC/7/4, para. 49), including their placement with persons accused or convicted of crimes and the lack of separation between young people and adults in detention (CMW/C/SEN/CO/1, para. 15; CMW/C/ECU/CO/2, para. 31). Moreover, the lack of procedural safeguards concerning decisions on detention, including limited access to information and legal assistance or consular services, little or no professional interpretation services and failure to respect the right to family visits, is frequently highlighted by human rights mechanisms (CMW/C/BIH/CO/2, paras. 25-27; A/HRC/23/46/Add.4, para. 54).

[31] International Covenant on Civil and Political Rights, art. 9, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 16, paras. 1 and 4.

[32] International Covenant on Civil and Political Rights, art. 10, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 17.

C. Overcrowding

47. Overcrowding in places of deprivation of liberty constitutes a frequent and severe problem across the globe. Capacities in many prisons are often exceeded (CCPR/CO/83/GRC, para. 12; CAT/C/MDA/CO/2, para. 18; E/C.12/BEN/CO/2, para. 23; A/HRC/18/35/Add.6, para. 58; A/HRC/17/42, para. 51; A/HRC/22/53/Add.2, paras. 46-47). While overcrowding is mostly addressed in the context of imprisonment, human rights mechanisms have also examined cases of overcrowding, for instance in psychiatric hospitals and migrant detention centres (CAT/C/RUS/CO/4, para. 18; A/HRC/11/7/Add.2, para. 62).

48. Article 10 of the International Covenant on Civil and Political Rights lays down the fundamental rule that all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. As the Human Rights Committee has pointed out in paragraph 3 of its General Comment No. 21, persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty. Moreover, respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Rules 9 to 22 of the Standard Minimum Rules for the Treatment of Prisoners provide further guidelines on the minimum requirements for accommodation and living conditions in places of deprivation of liberty.

49. Overcrowding inevitably has an adverse impact on conditions in places of deprivation of liberty and leads to serious violations of human rights, such as denial or lack of access to medical care, food, sanitation, security and rehabilitation services (A/HRC/22/53/Add.2, para. 47; CAT/C/SLV/CO/2, para. 17; A/HRC/7/3/Add.3, para. 64; E/C.12/IND/CO/5, para. 35). It has also been mentioned that overcrowded cells in prisons foster the development of an offender subculture, which is difficult for prison staff to control. Detainees lack space for privacy, and the risk of intimidation and inter-prisoner violence is high (A/HRC/7/3/Add.3, para. 65). In addition, overcrowding seems to facilitate corruption in several ways, including payment for moving to less populated cells (A/HRC/16/47/Add.3, para. 99).

50. Various human rights mechanisms have addressed factors, legal policies and practices leading to the overcrowding of prisons and other places of deprivation of liberty. They include, for instance, frequent delays in the judicial system, poor monitoring of inmate status and release entitlement, the popularity of tougher law and order approaches favouring longer prison terms over alternative measures, and the failure to grant parole (A/HRC/11/2/Add.2, para. 42; A/HRC/16/47/Add.3, para. 77; CCPR/CO/81/BEL, para. 19; CAT/C/CRI/CO/2, para. 6). The overuse of pretrial detention (see paras. 40-42) and the disproportionate length of sentences in relation to the seriousness of offences have been identified as contributing to the overcrowding of prisons (A/HRC/7/3/Add.3, para. 65; A/HRC/16/47/Add.3, para. 77; CCPR/CO/81/BEL, para. 19).

51. While the construction of additional facilities may be appropriate in some cases, it is only a partial remedy and hardly sufficient to resolve the problem (A/HRC/7/3/Add.3, para. 65; CCPR/C/TGO/CO/4, para. 18). Efforts to ease overcrowding should include alternatives to deprivation of liberty, such as mediation, diversion, community service and administrative and monetary sanctions.

D. Death and cases of serious injury in detention

52. As highlighted by the Special Rapporteur on extrajudicial, summary or arbitrary executions in paragraph 42 of his report on his mission to the United States of America (A/HRC/11/2/Add.5), in the custodial environment, a state has a heightened duty to ensure and respect the right to life. Thus, there is a rebuttable presumption of state responsibility — whether through acts of commission or omission — for custodial deaths. The state must affirmatively show that it lacks the responsibility to avoid this inference, and has an obligation to investigate and publicly report its findings and evidence supporting them.

53. Persons deprived of their liberty are at heightened risk of ill-treatment and torture, including through legally sanctioned violence, such as penalties or disciplinary measures prohibited under international human rights law (A/HRC/11/2/Add.3, paras. 45-47; CAT/C/QAT/CO/2, para. 12; CRC/C/BDI/CO/2, para. 39). Violence among prisoners, riots, prison unrest, mass escapes and staff strikes also lead to serious injury and death (CAT/OP/PRY/1, para. 168; CAT/C/SLV/CO/2, para. 18; A/HRC/11/2/Add.2, para. 41). Violations of economic, social and cultural rights, such as chronic malnutrition or lack of food, inhuman sanitary conditions and a lack of access to basic health care, have also been identified among the main reasons for death in detention (E/C.12/COD/CO/4, para. 32; CAT/OP/BEN/1, paras. 221-222; A/HRC/14/24/Add.3, para. 85; A/HRC/20/22/Add.1, para. 52; E/CN.4/2006/53/Add.4, para. 70).

54. The issue of deaths and serious injuries is not limited to prisons but exists in all places of deprivation of liberty. Concerns have been raised regarding, for instance, abuse, ill-treatment and deaths in health-care facilities (A/HRC/22/53) and detention centres for migrants (A/HRC/11/2/Add.5, paras. 28 ff.).

55. Human rights mechanisms have pointed out certain factors conducive to violence and ill-treatment. For instance, medical examinations of detainees in police stations and detention centres are not always carried out (CAT/OP/PRY/1, para. 92; CAT/OP/MDV/1, para. 110). Poor conditions in and administration of places of deprivation of liberty, including prisons run by prisoners (see A/HRC/8/3, paras. 68 ff.) and the lack of sufficient budgetary allocations (see A/HRC/20/22/Add.1, para. 56), overcrowding (A/HRC/11/2/Add.2, para. 42, 44), poor security arrangements (A/HRC/14/24/Add.3, para. 84) and corruption (A/HRC/7/3/Add.7, paras. 37-38; A/HRC/11/2/Add.5, paras. 33 ff.) also contribute to creating an environment prone to violence and abuse. In addition, data on inmate deaths or injuries are often missing, incomplete or inadequate, contributing to a lack of transparency (CAT/OP/MEX/1, para. 173; CAT/OP/MDV/1, para. 115; CAT/OP/BEN/1, para. 223; A/HRC/18/32/Add.2, para. 54). Another crucial factor is the lack of a fully functioning system of independent monitoring of places of deprivation of liberty (CAT/OP/SWE/1, para. 16).

56. The failure to carry out a prompt and impartial investigation into cases of death and serious injury so as to bring perpetrators to justice and provide full and adequate reparation has also been highlighted by human rights mechanisms (CAT/C/KAZ/CO/2, para. 21). Impunity is a consequence of the failure to carry out investigations or to carry them out diligently. A lack of adequate investigations also leads to widespread distrust in the justice system and discourages victims from reporting alleged abuse (CAT/OP/MEX/1, paras. 268-269). Moreover, persons

deprived of their liberty often do not make complaints about ill-treatment or torture, either because they do not know they have the right to do so or because they are afraid of possible reprisals (CAT/OP/PRY/1, para. 99; A/HRC/11/2/Add.2, para. 43). If such incidents are not reported, victims and their families have no possibility of obtaining redress, including medical and psychological treatment and guarantees of non-repetition (CAT/OP/MEX/1, para. 269).

E. Protection of specific groups deprived of their liberty

57. Specific groups, including children, women and persons with disabilities, face particular challenges and have distinct needs when deprived of their liberty.

58. It is estimated that at least 1 million children are in detention worldwide, most of whom have committed only minor offences (A/HRC/21/26, para. 44; CRC/C/15/Add.264, para. 67). The Convention on the Rights of the Child and various other international standards, such as the Beijing Rules (see para. 9 above), provide for an extensive framework for their protection. Accordingly, a child-rights approach to justice primarily entails a justice system that is responsive to children's needs and focuses on the best interest and well-being of the child. Children are entitled to the same rights as adults. As children differ from adults in their physical and psychological development and in their emotional and educational needs, children are also entitled to additional care and protection that accounts for their age. As a basic principle, deprivation of personal liberty must be considered on a very exceptional basis and for the shortest period of time possible.

59. While the legal framework for the human rights of children deprived of their liberty is extensive, human rights mechanisms have highlighted the persistence of a number of problems in practice. It is of concern that the detention of children, including pretrial detention, is rarely used as a measure of last resort. In some States, even very young children may be deprived of their liberty. When children are deprived of their liberty, conditions are often found inadequate and are not adapted to children's needs. For instance, they lack access to adequate education and vocational training in a number of countries. Complaints also concern the inadequacy and insufficiency of training of personnel working with children in the juvenile justice system (A/HRC/21/26, paras. 35 ff.). The fact that during their detention, children are faced with high levels of violence, including sexual violence, and that protection from such violence is not always adequate is of particular concern (see A/HRC/21/25).

60. More than 600,000 women and girls are held in penal institutions around the world.[33] The numbers are increasing. Much of the increase can be explained by a greater severity in sentences rather than an increased number of offences (A/HRC/11/8, para. 47). Complementing relevant international human rights instruments, the Bangkok Rules lay down specific standards for the treatment of women prisoners and offenders aimed at ensuring better and safer conditions in detention and for gender-sensitive care and diversion schemes.

[33] Roy Walmsley, World Female Imprisonment List, 2nd ed. (London, International Centre for Prison Studies, 2012). Available from www.prisonstudies.org/images/news_events/wfil2ndedition.pdf.

61. An underlying problem is the fact that a large proportion of women have been deprived of their liberty for petty crimes. In a number of States, the detention of women is closely related to drug trafficking, in particular for having transported drugs (CEDAW/C/BRA/CO/7, para. 32; A/HRC/17/26/Add.5, paras. 45 and 48). Conditions of detention are often not adapted to women's needs.[34] For instance, women are not supervised by women officers, and gender-specific health care is not available (A/63/38, part two, para. 391). It is also of particular concern that while in detention, women are at heightened risk of experiencing gender-specific violence, including torture (E/CN.4/2006/61/Add.2, para. 57; A/HRC/16/52/Add.5, para. 70; see also E/CN.4/1998/54, paras. 115 ff.). In particular, detention in mixed-sex prisons and the presence of male guards increases their risk of being victims of violence, including sexual violence (CEDAW/C/CAN/CO/7, para. 33; E/CN.4/1999/68/Add.2, para. 55).

62. While the Convention on the Rights of Persons with Disabilities provides that persons with disabilities should enjoy the right to liberty and security of the person on an equal basis with others, they face some unique challenges in the enjoyment of their rights (see E/CN.4/2005/6, paras. 47 ff.; A/HRC/22/53, paras. 11 ff.). Human rights mechanisms have expressed particular concern about cases in which disability is the sole ground for detention (CRPD/C/HUN/CO/1, para. 27; CRPD/C/CHN/CO/1, para. 25) and cases involving the involuntary detention of persons with disabilities, in particular those with "mental health problems" (CRPD/C/PER/CO/1, para. 28). In other cases, persons with disabilities have had their legal capacity lifted or restricted because of their disability (CAT/C/BGR/CO/4-5, para. 19; CCPR/C/RUS/CO/6, para. 19), and decisions on institutional care are sometimes made by the guardian rather than the persons themselves (CRPD/C/HUN/CO/1, para. 27). Once in a situation of deprivation of liberty, persons with disabilities are then faced with poor living conditions (CAT/C/MDA/CO/2, para. 26) and are subjected to mistreatment. For instance, the use of coercive force on psychiatric patients (CCPR/C/NOR/CO/6, para. 10), including the use of enclosed restraint beds (cages/net beds) in institutions as a means to restrain mental health patients, including children (CCPR/C/HRV/CO/2, para. 12), has been highlighted as particularly worrying.

IV. Conclusions and recommendations

63. **More than 10 million persons are deprived of their liberty in the world today, and about 3 million of them are awaiting trial. The international legal framework for the protection of all persons deprived of their liberty is comprehensive. Key issues are dealt with through a large number of treaties, other instruments and related jurisprudence. The International Covenant on Civil and Political Rights, ratified by 167 States, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by 153 States, provide important legal protection for persons deprived of their liberty. The Optional Protocol to the Convention against Torture has**

[34] In that context, the Committee on the Elimination of Discrimination against Women, in paragraph 7.5 of its views concerning communication No. 23/2009 (CEDAW/C/49/D/23/2009), recalled that the fact that detention facilities do not address the specific needs of women constitutes discrimination, within the meaning of article 1 of the Convention.

attained 69 ratifications in just over 10 years since its adoption. States that have not ratified these instruments are invited to do so.

64. Issues relating to the protection of persons deprived of their liberty are raised and dealt with by numerous international mechanisms on a regular basis. This may be considered a challenge to the current machinery, owing to the potential for overlap or risk of lack of coherence between the findings and recommendations of various mechanisms (see A/66/860, sect. 2.3.5). At the same time, the specialized expertise of each mechanism and its capacity to examine issues from different perspectives may also be seen as contributing to an increase in the level of protection for persons deprived of their liberty.

65. However, the reality of persons deprived of their liberty in all regions remains alarming. Therefore, the most important step in the protection of all persons deprived of their liberty is to ensure the implementation of these norms and standards at the national level. Further action by the international community is required, in particular advocacy to increase political will and the provision of support, including technical assistance, to States to ensure or increase the ratification of all relevant binding instruments, ensure adherence to and strengthen the conformity of domestic legislation and policies with international norms and standards, including through national preventive mechanisms. States should also increase cooperation with existing mechanisms, including with regard to reporting obligations, the issuance of invitations for country visits and the implementation of and follow-up to relevant recommendations of all international mechanisms, including the universal periodic review. Furthermore, States should support ongoing efforts to strengthen the work of treaty bodies and special procedures, including by allocating adequate resources to these existing mechanisms.

66. Building upon the initial exploration in the present report of the international legal and institutional framework for the protection of persons deprived of their liberty in accordance with General Assembly resolution 67/166, there is a need for further in-depth analysis of the underlying problems and structural shortcomings relating to many recurrent issues of concern for persons deprived of their liberty identified in the present report: the lack of judicial oversight; the overuse of detention; overcrowding; death and cases of serious injuries in detention; and the protection of groups with distinct needs while deprived of their liberty.

67. In that context, the activities of relevant United Nations agencies furthering the protection of all persons deprived of their liberty should be further explored with a view to strengthening existing coordination and capacity to support States in dealing with the above-mentioned priority issues.